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No. 03-167

Supreme Court, U.S.
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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent defends the court of appeals' judgment, which vacated his conviction based on a Rule 11 violation in the taking of his guilty plea, on three alternative grounds. He contends that the court of appeals properly vacated the conviction because his guilty plea was unintelligent and involuntary; he contends that the standard applied by the court of appeals to find prejudice from a Rule 11 error (that the error was not minor or technical and the defendant did not understand the right at issue when he entered his plea) is correct; and he contends that he would prevail even under the government's standard because the record shows that he would have persisted in his plea of not guilty if there had been no Rule 11 error.

As explained below, each of these contentions is without merit. There was no constitutional violation in this case; the Ninth Circuit's standard for plain-error review of a Rule 11 error is incorrect; and respondent

cannot prevail under the correct standard. The Court should hold that, when a violation of Rule 11 is raised for the first time on appeal, the defendant cannot meet his burden to establish reversible plain error unless he can show that, but for the Rule 11 error, he would not have pleaded guilty—a burden that respondent cannot carry.[1]

I. THIS CASE DOES NOT INVOLVE AN UNCONSTITUTIONAL GUILTY PLEA

Respondent contends that his guilty plea was unintelligent and involuntary, and therefore "constitutionally infirm." Br. 32-33. Accord Amicus Br. 17-18. Respondent is mistaken.

As an initial matter, this contention goes beyond the issue that was resolved by the court of appeals and on which certiorari was granted. The court of appeals held that respondent's plea was taken in violation of Rule 11 of the Federal Rules of Criminal Procedure, not that it was taken in violation of the Constitution. See Pet. App. 5a-10a. Contrary to respondent's assertion, moreover, the court did not "declare[] the [Rule 11] error to be of constitutional proportions." Resp. Br. 39. Consistent with what the court of appeals did decide, this

[1] Respondent's amicus asserts that the government's brief on the merits raises issues that go beyond the questions presented in its petition for a writ of certiorari. Amicus Br. 2-4, 6-10. That suggestion is unfounded. In the section of its opening brief that discusses the standard for determining whether a plain Rule 11 error affects substantial rights, the government urged the Court to adopt the approach followed by nine courts of appeals and to reject both the Ninth Circuit's approach and the "core concerns" approach of the Eleventh Circuit. Br. 20-31. The position set forth in the certiorari petition, which asked the Court to resolve this three-way circuit split, is the same as that in the government's opening brief. See Pet. 15-20.

Court granted certiorari to resolve a conflict over the standard for determining when a violation of Rule 11 constitutes reversible plain error. See Pet. i, 15-23.

Respondent's constitutional claim also fails on the merits. While this Court has made clear that a guilty plea may be constitutionally invalid if the defendant does not understand the nature of the charge to which he is pleading or certain constitutional rights that he is waiving, see *Henderson* v. *Morgan*, 426 U.S. 637, 645 n.13 (1976); *Boykin* v. *Alabama*, 395 U.S. 238, 243 n.5 (1969), the record in this case leaves no doubt that respondent understood both the nature of the charge and all of his constitutional rights.[2] Respondent does not contend otherwise. His claim is that his guilty plea was constitutionally invalid because the district court failed to advise him that he could not withdraw the plea if the court did not accept the parties' sentencing recommendations. See Resp. Br. 32-33. The premise of that claim seems to be that any violation of Rule 11 prevents a plea from being knowing and voluntary. See, *e.g.*, *id.* at 17 (referring to "the constitutional principles imbedded in Rule 11"). But this Court has

[2] Both the plea agreement and the district court advised respondent of the nature of the conspiracy charge to which he was pleading and of the various constitutional rights he was waiving. Pet. App. 26a-27a, 28a-29a; J.A. 62, 63, 67-68. Respondent acknowledged, both when he signed the agreement and at the time of his plea, that he understood the agreement, Pet. App. 35a; J.A. 62-63, and he specifically acknowledged during the plea colloquy that he understood the nature of the charges and his constitutional rights, J.A. 62-63, 67-68. At the conclusion of the change-of-plea hearing, the district court found, as a fact, that respondent understood both his plea agreement and the plea proceeding; that he understood "all of his constitutional rights" and "knowingly, intelligently, and voluntarily waived those rights"; and that he was pleading guilty "freely and voluntarily." J.A. 77, 79.

repeatedly rejected that view, see *United States* v. *Timmreck*, 441 U.S. 780, 783 (1979); *Halliday* v. *United States*, 394 U.S. 831, 833 (1969) (per curiam); *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969), as respondent himself acknowledges elsewhere in his brief, see Br. 19 (quoting *McCarthy*); Br. 28 (citing *Timmreck*).

II. THE NINTH CIRCUIT'S STANDARD IS ERRONEOUS

Respondent also contends that the Ninth Circuit's standard for finding reversible Rule 11 error is correct, and that the standard applied by the majority of circuits is wrong, because, he says, the majority standard is inconsistent with this Court's decisions and would have undesirable practical consequences. Respondent is wrong on both counts.

A. The Ninth Circuit's Standard Is Inconsistent With This Court's Decisions

1. As the government pointed out in its opening brief (at 20), this Court held in *United States* v. *Olano*, 507 U.S. 725 (1993), that an effect on substantial rights under the plain-error rule has the same meaning that it has under the harmless-error rule: it ordinarily means that the error "must have been prejudicial," which in turn means that it "must have affected the outcome of the district court proceedings." *Id.* at 734. Despite that unambiguous holding, respondent contends that the Ninth Circuit's standard—which does not require a showing that a Rule 11 error affected a defendant's decision to plead guilty—is consistent with *Olano*. Br. 9-11, 14-15, 29. Accord Amicus Br. 4- 5, 15-18. Respondent is mistaken.

As an initial matter, the language quoted above refutes respondent's contentions that *Olano* "never required or endorsed any particular test for establishing

prejudice" and "implicit[ly] recogni[zed] that courts have the flexibility to determine what degree of prejudice, if any, will be required in a given case." Br. 10-11. *Olano* adopted a general rule requiring an effect on the outcome in order to establish prejudice. Nor can respondent square *Olano* with the Ninth Circuit's test for determining whether a Rule 11 error affected substantial rights by noting that *Olano* allowed that "a showing of prejudice may not be required at all under some circumstances." Br. 10. While *Olano* did refer to the "special category of forfeited errors that can be corrected regardless of their effect on the outcome," 507 U.S. at 735, that category consists of "structural" errors—those "fundamental constitutional errors" that "defy harmless-error review" because, instead of being simply "error[s] in the trial process itself," they "affect[] the framework within which the trial proceeds" and thus "infect the entire * * * process." *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999) (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991), and *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993)). As the government explained in its opening brief (at 30-31), a district court's failure to provide a particular piece of advice required by Rule 11, whose procedures are not even of constitutional magnitude, is far removed from the small category of errors that have been held to be "structural." And even if a Rule 11 error were somehow thought to be "structural," such that it necessarily satisfied the third requirement of the plain-error rule, this Court's decisions in *Johnson* v. *United States*, 520 U.S. 461 (1997), and *United States* v. *Cotton*, 535 U.S. 625 (2002), make clear that a defendant claiming a Rule 11 violation cannot satisfy the *fourth* requirement of the rule—a serious effect on the fairness, integrity, or public reputation of a judicial proceeding—unless he

demonstrates that the error affected the proceeding's outcome. See U.S. Br. 31-34.

Respondent contends that the Rule 11 error in this case "did affect the outcome" of the district court proceedings, because "he was sentenced to 12-33 more months than he bargained for." Br. 10. Accord *ibid.* ("he was prejudiced by receiving a significantly harsher sentence"); Amicus Br. 17. Under these circumstances, respondent says, "the prejudice is * * * abundantly obvious." Br. 11. But unless respondent would have declined to plead guilty if he had been advised that he could not withdraw his plea in the event that the judge imposed a longer sentence than the one set forth in the plea agreement, the failure to provide that Rule 11 advice had no effect at all on his sentence. That is why the relevant inquiry is whether the Rule 11 error affected the defendant's decision to plead guilty.

2. While this Court has not previously had the opportunity to apply *Olano*'s standard to guilty pleas, the government pointed out in its opening brief (at 21-22) that the Court has held, in a different context, that a violation of a defendant's rights in connection with a guilty plea does not result in "prejudice" unless it affected his decision to plead guilty. In *Hill* v. *Lockhart*, 474 U.S. 52 (1985), a case involving the question whether counsel's deficient performance in advising the defendant to enter a guilty plea was sufficiently prejudicial to qualify as ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court concluded that the relevant inquiry is whether, but for counsel's errors, the defendant "would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. Respondent contends (Br. 29-30) that *Hill* provides no support for the government's position, because a violation of Rule 11 by a

district judge is different from a defense attorney's erroneous advice concerning a guilty plea.

Respondent is again mistaken. While the two situations are obviously different in some respects, they are similar in the respect that is relevant here. When a defense lawyer has given deficient professional advice in connection with a guilty plea, and the defendant seeks to have his plea vacated on the basis of the deficiency, the question, under the Sixth Amendment, is whether the defendant was prejudiced by the advice. Likewise, when a district judge has given erroneous Rule 11 advice in connection with a guilty plea, and the defendant seeks to have his plea vacated on the basis of the error, the question, under Rule 52(b), is whether the defendant was prejudiced by the advice. The principle established in *Hill*—that the relevant inquiry is whether the defendant would have persisted in his plea of not guilty if the advice had not been deficient—is thus applicable here as well.

3. Respondent also contends that the Ninth Circuit's standard is consistent with this Court's decision in *United States* v. *Vonn*, 535 U.S. 55 (2002), which, he says, "pursued an awareness analysis." Br. 14-15. By that, respondent seems to mean that the effect–on-substantial-rights standard applied in *Vonn* was whether the defendant was aware of the omitted Rule 11 information, not whether he would have persisted in a plea of not guilty if the information had been provided. That is also incorrect.

The Court did not address in *Vonn* the appropriate standard for deciding whether a plain Rule 11 error affects substantial rights. It held that a forfeited claim of Rule 11 error is reviewed under a plain-error rather than a harmless-error standard, 535 U.S. at 62-74, and that a court of appeals may consider the entire record in

conducting either plain-error or harmless-error review, *id.* at 74-76. It then remanded the case for proceedings consistent with its opinion. *Id.* at 76. While the Court did note that the standard applied by the court of appeals (in that case, too, the Ninth Circuit) was whether the defendant was aware of the omitted information, see *id.* at 61, the Court itself did not apply that (or any other) standard. And even if respondent were correct in his suggestion (Br. 15) that *Vonn* stands for the proposition that a defendant who was otherwise aware of the omitted Rule 11 information cannot establish an effect on substantial rights, that proposition would be consistent with the government's position. While an awareness of the omitted information is not a necessary basis for a finding that a defendant would have persisted in his plea of not guilty if the Rule 11 error had not occurred, it is ordinarily a sufficient one. See U.S. Br. 25-27.

B. There Is No Meritorious Practical Objection To The Standard Applied By The Majority Of Circuits

1. Respondent contends that the standard advocated by the government should be rejected because there is an inadequate record on direct appeal for a court to determine whether a defendant would have persisted in a plea of not guilty if a Rule 11 error had not occurred. Br. 35-37. A guilty plea colloquy, respondent says, "does nothing to show" whether a defendant would have gone to trial if the district court had fully complied with Rule 11. Br. 35. Respondent's argument is misguided, because its premise was explicitly rejected in *Vonn*. That case holds that a court reviewing a claim of Rule 11 error is not "limited to examining the record of the colloquy" but "may look to the entire record begun at the defendant's first appearance" in the criminal

case. 535 U.S. at 59. The record on appeal will therefore include, at the very least, the indictment or information; transcripts of the initial appearance, arraignment, change-of-plea hearing, and sentencing; the Presentence Report; the parties' sentencing submissions; the judgment of conviction; and, except in the Ninth Circuit (see Pet. 23-27), a plea agreement, if there is one. Depending on the stage of the case at which the defendant decided to plead guilty, the record may also include a complaint, search-warrant application, or wiretap application; other discovery materials; a transcript of a pre-trial detention hearing, status conference, or pre-trial motion hearing; briefing on the government's request for pre-trial detention or on a defendant's pre-trial motions; and, as was the case here, a written or oral request for substitution of counsel.

A record of this type is sufficient for a court of appeals to determine whether a Rule 11 error affected a defendant's decision to plead guilty. For example, the record will almost always enable the court to determine whether the guilty plea resulted in a significantly reduced sentence or one that was not appreciably shorter than it would otherwise have been. See U.S. Br. 26-27 & n.16. The record will also ordinarily enable the court to determine whether the evidence against the defendant was so strong that he was not likely to have risked a guilty verdict or weak enough that he may have. See *id.* at 27 & n.17. And, as in this case, the record may include statements by the defendant or his lawyer that are direct evidence either that the defendant was intent on pleading guilty or that he was reluctant to do so. See *id.* at 26 & n.15.

2. Respondent also contends that the government's proposed standard should be rejected because it is "almost impossible to meet." Br. 11. Accord *id.* at 35-

36; Amicus Br. 5, 18-19. This contention should likewise be rejected.

As an initial matter, because the plain-error rule requires a defendant to show (absent "structural" error) both that the error affected the outcome of the proceeding and that it seriously affected the fairness, integrity, or public reputation of the proceeding, *Olano*, 507 U.S. at 734-737, a court's authority to reverse on the basis of a forfeited claim of error is necessarily "limited" and "circumscribed," *id.* at 731, 732. As Judge Boudin has observed, it is always "extremely hard to establish" reversible plain error. *United States* v. *Vigneau*, 187 F.3d 70, 82 (1st Cir. 1999), cert. denied, 528 U.S. 1172 (2000). See also *Olano*, 507 U.S. at 742 (Kennedy, J., concurring). At the same time, it is not impossible to do so, and it would not be impossible in a case involving a Rule 11 error if the Court adopted the standard advocated by the government. In a case where the defendant obtained little sentencing benefit from a guilty plea, where there was a substantial chance of acquittal if the defendant had gone to trial, where the defendant made statements indicating that he was reluctant to plead guilty, or where there was a combination of factors of this kind, a court of appeals might be able to conclude that the defendant had established that the Rule 11 error affected his decision to plead guilty.

But it is not necessary to speculate about whether courts would be able to do so. The government's proposed standard is already applied by a majority of the circuits, see U.S. Br. 22 n.11, and courts in these circuits have reversed convictions on the basis of a Rule 11 violation to which there was no objection in the district court. See *United States* v. *Reyes*, 300 F.3d 555, 561 (5th Cir. 2002) (defendant's "willingness to plead guilty would likely have been affected" by knowledge of omitted Rule 11 advice); *United States* v. *Gandia-Maysonet*, 227 F.3d 1, 4 (1st Cir. 2000) (misstated Rule 11 advice "was likely enough to have influenced the plea so that the plea should now be set aside").

3. While exaggerating the consequences of adopting the standard applied by the majority of circuits, respondent ignores the consequences of rejecting it. The latter are starkly illustrated by a Sixth Circuit decision that was filed soon after the government filed its opening brief in this case, a decision that respondent's amicus holds out as an example of a case that correctly applies the plain-error rule (Br. 14-15). In *United States* v. *Rose*, 357 F.3d 615 (6th Cir. 2004), a defendant who delivered a pound of methamphetamine with a co-defendant entered into a plea agreement in which he agreed to plead guilty to the offense of *attempting* to distribute at least 50 grams of the drug, but he instead pleaded guilty, without objecting, to *conspiring* to distribute that amount. *Id.* at 619-622. The court of appeals held that the district court committed reversible plain Rule 11 error by failing to ensure that the defendant understood the nature of the charge to which he was pleading guilty and by accepting the plea without an adequate factual basis. *Id.* at 622-626. The holding was based solely on the discrepancy between the crime to which the defendant agreed to plead guilty (attempt) and the crime to which he did plead guilty (conspiracy). *Id.* at 623-626. The court of appeals explicitly rejected the view that the defendant was required to "prove that he would not have pleaded guilty absent the deficiency in order to obtain reversal." *Id.* at 622 n.4.

Since the criminal conduct in *Rose* (delivering drugs with another person) constituted both attempt and

conspiracy, since the two offenses are violations of the same statute (21 U.S.C. 846), and since they carry the same statutory and Guidelines penalties (see 21 U.S.C. 841(b)(1)(B); Sentencing Guidelines § 2D1.1), there can be little doubt that the defendant in the case was indifferent as to whether the crime to which he pleaded guilty was attempt or conspiracy. Under these circumstances, it is not merely likely but virtually certain that any Rule 11 error did not affect the outcome of the case. The Sixth Circuit nevertheless held that the error both affected the defendant's substantial rights and seriously affected the fairness, integrity, or public reputation of the proceedings. 357 F.3d at 622-623 n.4, 626. Whatever room there is for disagreement about the scope of the plain-error rule, it cannot be the case that its requirements are satisfied when the crime to which a defendant agrees to plead guilty is identical in every relevant respect to the crime to which he does plead guilty. This Court should not endorse an interpretation of the rule that would lead to such a result.

III. RESPONDENT CANNOT ESTABLISH THAT HE WOULD HAVE PERSISTED IN HIS PLEA OF NOT GUILTY IF HE HAD BEEN GIVEN THE OMITTED RULE 11 ADVICE

In addition to arguing that his guilty plea was unconstitutional, and that the government's proposed standard is incorrect, respondent argues that he can satisfy that standard. Br. 37-39. He contends that he is able to show that he would have persisted in his plea of not guilty if he had been given the Rule 11 advice omitted by the district court: that he could not withdraw his plea if the court rejected the parties' sentencing recommendations. *Ibid.* But respondent does not deny that he made no attempt to withdraw his guilty plea in the

district court; he does not deny that statements he made to the district court show that he did not wish to go to trial; he does not deny that a guilty plea enabled him to avoid a significantly longer prison term; he does not deny that the evidence of his guilt was overwhelming, and thus made the chances of acquittal low; and he does not deny that the district court repeatedly advised him that it was not bound by the plea agreement. See U.S. Br. 35-38. Nor does respondent claim to have been under the impression that he *would* be able to withdraw his plea if the district court did not follow the parties' sentencing recommendations. See *id.* at 38. Finally, and perhaps most importantly, respondent has still never stated, in clear and unequivocal terms, that he would have elected to go to trial if he had been given the omitted Rule 11 advice. See *id.* at 35-36. Cf. *Hill* v. *Lockhart*, 474 U.S. at 60 (no prejudice where defendant "did not allege" that, had counsel not given erroneous advice, "he would have pleaded not guilty and insisted on going to trial").

Instead, respondent claims to be able to demonstrate that the Rule 11 error affected his decision to plead guilty because he was "ready to go to trial"; because he was provided with inadequate information by his lawyer and felt "railroaded" into signing his plea agreement; because he "moved to withdraw his plea through the direct appeal process"; and because he "might have had" an entrapment defense. Br. 37-38. These assertions do not enable respondent to discharge his burden of establishing reversible plain error.

First, the status conference at which respondent's counsel informed the district court that he was "ready to go to trial" (Resp. Br. 37) was the very conference at which respondent himself stated that "[t]he only thing I'm looking for is * * * a better deal" and that "[a]t no

time have I decided to go to any trial." J.A. 46-47. (Contrary to respondent's contention that he made these statements "more than one month" before he pleaded guilty, Br. 33, the status conference was held less than a week before his plea.) And while respondent's lawyer did inform the court that respondent was *ready* for trial, he did so in a way that made it clear that respondent did not wish to have one. Thus, when the court asked whether he was prepared to go to trial on October 19, 1999, respondent's counsel said the following:

> [Respondent,] as he has indicated here in court, doesn't want a trial. And I have represented that to [the Assistant United States Attorney] on several occasions.
>
> So to the extent that the government somehow wouldn't be ready on the 19th, it would be largely based on representations by me to [the Assistant United States Attorney]. I've told her all along there won't be a trial on the 19th based on my client's representations that he doesn't want a trial.
>
> And I do not have another trial set for that date, however, and I suppose if there would be a trial on that date, I would be here and be ready to try it. Nobody seems to be asking for one, though.

J.A. 51-52.

Second, while it is true that, after pleading guilty (and before he was sentenced), respondent expressed the view in a letter to the district court that he felt he had been "railroaded into signing the deal that I signed" (J.A. 98), that statement, particularly when viewed in the context of the entire record, is not evidence of a desire to go to trial. It is, instead, evi-

dence that respondent was unhappy with the sentence recommended in the Presentence Report, and it is entirely consistent with his earlier statement to the court that he never wanted to go to trial and was only looking for a more favorable plea agreement. The same is true of respondent's complaints about his attorney at the sentencing hearing, where he explicitly acknowledged that he had "always accepted responsibility" for his crime. J.A. 112. Respondent complained because he wanted a better plea bargain, not because he wanted a trial instead of a plea.

Third, because a defendant can move to withdraw a guilty plea only before sentencing, see Fed. R. Crim. P. 32(d) and (e), respondent's contention that he "moved to withdraw his plea through the direct appeal process" (Br. 37) is an oxymoron. Respondent makes no attempt to explain why, if he had truly been misled into pleading guilty by the omission of the Rule 11 advice, he did not move to withdraw his plea at the earliest possible opportunity, which in this case was no later than when he learned of the sentence recommended in the Presentence Report. See *United States* v. *Westcott*, 159 F.3d 107, 112 (2d Cir. 1998), cert. denied, 525 U.S. 1084 (1999); *United States* v. *Vaughn*, 7 F.3d 1533, 1536 (10th Cir. 1993), cert. denied, 511 U.S. 1036 (1994).

Fourth, if it were true that respondent "might have had" a viable entrapment defense (Resp. Br. 38), one would think that his attorney's failure to pursue that strategy would have been one of respondent's complaints about his lawyer in the district court. But as the court of appeals observed in rejecting respondent's claim that the district court should have granted his motion for substitution of counsel, "[i]n his letters and statements to the [district] court, [respondent] never alleged [that his attorney] was failing to investigate an

entrapment defense." Pet. App. 23a. If respondent did have a colorable entrapment defense, one would also think that he would at least describe its factual basis, particularly since it is respondent's burden to establish that the Rule 11 error affected his decision to plead guilty. But his brief is silent on that issue. There is thus no reason to believe that respondent would have gone to trial, admitted his crime, and argued entrapment to the jury if he had known that a sentence higher than the stipulated one would not entitle him to withdraw his plea.

* * * * *

For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

APRIL 2004